FILED
FEB 28 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 806

ARTHUR WERKING,

Plaintiff-Appellee,

— against —

AMITY ESTATES, INC., RALPH SPOOR, Treasurer of Greene County and GREENE COUNTY,

Defendants-Appellants,

THE BOARD OF SUPERVISORS OF GREENE COUNTY, brought in as a party to answer the counterclaim of the defendant AMITY ESTATES, INC., herein,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

INDEX

PAGE

Introduction 1
Opinions Below 2
Jurisdiction 2
Questions Presented 6
Statement of the Case 7
The Questions Are Substantial 9
Conclusion 13

Appendix:

A—Trial Findings, Supreme Court—Greene County, May 11, 1955 15

B—Decision, Appellate Division, New York Supreme Court, December 23, 1955 18

C—Decision, New York Court of Appeals, July 11, 1955 .....19, 30, 32
Majority Opinion 19
Minority Opinion 31

D—The Order of the New York Court of Appeals, October 11, 1956, the Order appealed from .. 32

E—Notice of Motion in the New York Court of Appeals, returnable October 1, 1956 33

F—Applicable Statutes—Constitution of the State of New York Article 6 § 7 34
Civil Practice Act of the State of New York Article 38 § 605 34
Tax Law: New York Consolidated Laws (Chapter 60) §§ 21, 25 35
§§ 26, 58..... 36
§§ 69, 69-A, 82..... 37
§§ 99, 125..... 38
§§ 130, 132..... 39

PAGE

§§ 137 40
§§ 151, 158 41
§ 166-j 42

TABLE OF CASES CITED

Acme Realty Co. v. *Schinasi* 215 N.Y. 495 10
Aerated Products Co. v. *Godfrey* 290 N.Y. 92 10
American Surety Co. v. *Baldwin* 287 U.S. 156, 162-4.. 5
Bernstein v. *Kritzer* 253 N.Y. 410 10
Berry v. *Brearton* 263 N.Y. 274 10
Brinkerhoff-Faris Trust Co. v. *Hill* 281 U.S. 673, 677-8 4, 5
Charleston Federal Savings & Loan Assn. v. *Alderson* 324 U.S. 182, 187, 65 S. Ct. 624, 89 L. Ed. 857, 862 4
Clark v. *Willard* 292 U.S. 112, 117-9 5
Cole v. *Arkansas* 333 U.S. 196, 200 4
Consolidated Electrical Storage Co. v. *Atlantic Trust Co.* 161 N.Y. 605 12
Covey v. *Town of Somers* 350 U.S. 882, 76 S. Ct. 138.. 4
Covey v. *Town of Somers* 351 U.S. 141, 76 S. Ct. 724.. 5
Dahnke-Walker Milling Co. v. *Bondurant* 257 U.S. 282 4
Dunham v. *Griswold* 100 N.Y. 224 12
Flournoy v. *Wiener*, 321 U.S. 253, 263, 64 S. Ct. 548, 88 L. Ed. 708, 715 4
Foreman v. *Foreman* 251 N.Y. 237 10
Great Northern R. Co. v. *Sunburst Oil Co.* 287 U.S. 358, 366-7 4
Gresser v. Cohen 275 N.Y. 440 10
Hefner v. *Northwestern Life Ins. Co.* 123 U.S. 747, 751, 8 S. Ct. 337, 338, 31 L. Ed. 309 10
Hill v. *Chicago & Evanston R. Co.* 140 U.S. 52, 54 5
Jones v. *Reilly* 174 N.Y. 97 12
Mabie v. *Fuller* 255 N. Y. 194 10

PAGE

Merchants National Bank v. *Barnes* 172 N.Y. 618 10
Missouri ex rel. Missouri Ins. Co. v. *Gehner* 281 U.S. 313, 320 4
Nelson v. *City of New York* 351 U.S. 930, 76 S. Ct. 786 4
Ohio ex rel. Bryant v. *Akron Park District* 281 U.S. 74, 79 4
Page v. *Page* 139 Misc. 102, 248 N.Y.S. 493 10
Radio Station W.O.W. v *Johnson* 326 U.S. 120, 127.... 5
Randall v. *Bailey* 288 N.Y. 280 10
Rogers v. *Alabama* 192 U.S. 226, 230-1 4
Saunders v. *Shaw* 244 U.S. 317, 320 4
Shepard v. *Manhattan R. C.* 162 N.Y. 56 10
Sundstrom v. *State* 213 N.Y. 68 10
Tilyou v. *Reynolds* 108 N.Y. 558 12
Turner v. *Smith* 14 Wall 553, 30 L. Ed. 724 10
Wahl v. *Barnum* 116 N.Y. 87, 95 12
Wilson v. *Cook* 327 U.S. 474, 485 5

OTHER AUTHORITIES CITED

State of New York

Constitution Article 6 § 7 .... 6, 10
Civil Practice Act § 605 .... 6, 10
Tax Law
§§ 21, 25, 58, 69-a, 82, 99, 125, 130, 151 9
§ 69 .... 1, 7
§§ 132, 137 10
§ 158 .... 9, 10
§ 166-j 11

PAGE

United States

Title 28, U.S. Code § 1257(2) 3
Title 28, U.S. Code § 2103 4
Constitution U.S.
Amendment 14 .....6, 7, 9, 11
Article 1 § 10 .....6, 7, 9, 11
Amendment 10 6

Miscellaneous

Cardozo, Jurisdiction of the Court of Appeals 2nd Ed. p. 98 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No.

ARTHUR WERKING,

Plaintiff-Appellee,

— against —

AMITY ESTATES, INC., RALPH SPOOR, Treasurer of Greene County and GREENE COUNTY,

Defendants-Appellants,

THE BOARD OF SUPERVISORS OF GREENE COUNTY, brought in as a party to answer the counterclaim of the defendant AMITY ESTATES, INC., herein,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Introduction

(References to Record are by Folio No.)

Appellants having urged constitutional grounds in the first reversal Court i.e. the New York State Court of Appeals appeal from the orders of that Court sustaining the validity of Section 69 of the New York State Tax Law as was applied to appellants to deprive them of all interest in the subject realty. Appellants submit this Statement to show that the Supreme Court of the United States has juris-

diction of the appeal and that a substantial question is presented.

Opinions Below

No opinion as such was written by the New York Supreme Court: Greene County after the trial. Findings of fact and conclusions of law were signed May 11, 1955 and appear in the record (388-403). A copy of the items of the findings is attached as Appendix "A".

The unanimous affirmance opinion of the Appellate Division of the Supreme Court dated December 23, 1955 is contained in the record (433-437), is reported 1 App. Div. 2d 731; 147 N.Y.S. 2d 474 and is annexed as Appendix "B".

The reversal majority opinion of the New York Court of Appeals as well as the dissenting minority opinion dated July 11, 1956 are reported in 2 New York 2d 43; 155 N.Y.S. 2d 633 and are annexed as Appendix "C".

The decision of the Court of Appeals denying the motion for reargument and to amend the remittitur dated October 11, 1956 are annexed as Appendix "D".

Motion in the Court of Appeals to reargue and to amend remittitur has been certified to supplement the record and the notice is annexed as Appendix "E".

Jurisdiction

(i) The action was instituted by Arthur Werking in the Supreme Court of the State of New York: Greene County to cancel a tax-deed and the antecedent tax sale certificate held by Amity Estates, Inc., to declare said deed and tax sale certificate invalid and that all of the defendants (now appellants) be adjudged to have no claim or interest in the

subject real property. The sole ground asserted by plaintiff at the trial was that subsequent to the county levy of the 1949 taxes in December of 1949 a town official, namely, the Collector of the Town of Greenville failed to post in five conspicuous places a notice that he had received the tax roll and warrant, that said tax might be paid to him at the times provided by law and that he would so attend for receipt of the tax. Various defenses and a counterclaim were interposed. After trial on the issues, judgment on the merits was granted in favor of the defendants including a dismissal of the complaint.

(ii) The plaintiff thereafter appealed to the Appellate Division of the Supreme Court: Third Department whereupon the decision and judgment were unanimously affirmed in December, 1955 by the five Justices.

(iii) The New York Court of Appeals to which Court by its permission a further appeal was taken, thereafter by a vote of four to three reversed the judgment, and granted judgment in favor of the plaintiff in July, 1956. Timely motion was made to the New York Court of Appeals for reargument and for an amendment of the remittitur to indicate that the defendants were urging constitutional grounds. The said motion was properly returnable October 1, 1956 but was in all respects denied October 11, 1956. The notice of appeal to the United States Supreme Court having been served January 2, 1957, was filed January 7, 1957 in the office of the Clerk of the County of Greene possessed of record as well as with the Clerk of the Court of Appeals and the within appeal is timely.

(iv) The jurisdiction of the Supreme Court to review the decision of the New York Court of Appeals by direct appeal is conferred by Title 28 U.S.C. § 1257 (2).

(v) The following decisions sustain the jurisdiction of the Supreme Court to review the order on direct appeal in this case: *Nelson* v. *City of New York* 351 U.S. 930, 76 S. Ct. 786; *Covey* v. *Town of Somers* 350 U.S. 882, 76 S. Ct. 138; *Dahnke-Walker Milling Co.* v. *Bondurant* 257 U.S. 282.

In any event, if appeal is not proper, then this should be treated as a Petition for Writ of Certiorari under Title 28 U.S.C. § 2103. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 187, 65 S. Ct. 624, 89 L. Ed. 857, 862.

Jurisdiction of this Court extends to other errors denying a Federal right. *Flournoy* v. *Wiener*, 321 U.S. 253, 263, 64 S .Ct. 548, 88 L. Ed. 708, 715.

(vi) The main record does not disclose that the constitutional questions were raised. For that reason appellants have had the reargument motion papers certified by the Clerk of the Court of Appeals showing that such questions were raised. That Court might have, as it did, overrule the constitutional grounds urged but its denial does not and cannot refute the fact that these were raised. The Supreme Court of the United States has the power to examine into the raising of the federal questions, especially where it is clear and apparent that the Court below refused to deal with the questions. *Rogers* v. *Alabama* 192 U.S. 226, 230-1. The summary denial of the rehearing without reference to the federal question does not prevent but will rather support the exercise of instant jurisdiction. *Great Northern R. Co.* v. *Sunburst Oil Co.* 287 U.S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill* 281 U.S. 673, 677-8; *Ohio ex rel. Bryant* v. *Akron Park District* 281 U.S. 74, 79; *Missouri ex rel Missouri Ins. Co.* v. *Gehner* 281 U.S. 313, 320; *Saunders* v. *Shaw* 244 U.S. 317, 320; *Cole* v. *Arkansas* 333 U.S.

196, 200; *cf. American Surety Co.* v. *Baldwin* 287 U.S. 156, 162-4; *Wilson* v. *Cook* 327 U.S. 474, 485, n.
The instant rehearing denial followed in date the reversal of *Covey* v. *Town of Somers* 351 U.S. 141, 76 S. Ct. 724. Shortly after said denial the Covey case was decided by the New York Court of Appeals which Court adhered to its original decision.

(vii) The constitutional questions were timely raised by the instant appellants, since these were created by the unexpected decision of the Court of Appeals. Thus the motion for reargument reasonably constituted the first and only chance to present the question to that Court. The instant appellants were successful in all of the Courts below, *Brinkerhoff-Faris Trust Co.* v. *Hill* 281 U.S. 673, 677-8.

(viii) The order appealed from is final for the purview of this appeal. The appellee is not concerned with the computation in any proceedings just between the appellants. *Clark* v. *Willard* 292 U.S. 112, 117-9. Because of the reversal the refund by the County of taxes advanced by Amity Estates, Inc., is as to such parties an agreed computation, referred to in the record (fol. 355, 113). Furthermore all the defendants are now appellants prosecuting the instant appeal.

Indeed, any delay or postponement of review at this time would end the right of appeal as against the instant appellee, since as to him the state litigation is concluded and the time to appeal is limited. *Hill* v. *Chicago & Evanston R. Co.* 140 U.S. 52, 54; *Radio Station W.O.W.* v. *Johnson* 326 U.S. 120, 127.

Questions Presented

(1) Whether said decision and decree violated the due process clause of the 14th Amendment, in that the Court of Appeals in its decision and decree voiding the tax deed and nullifying the defendants' interest in the subject premises necessary reviewed, decided and reversed findings of fact previously upheld by the lower court, contrary to Article 6, § 7 of the New York State Constitution and the implementing Section 605 of the Civil Practice Act of the State of New York; and said decision and the decree were in conflict with the previous decisions and precedents of the New York State Court of Appeals?

(2) Whether the said decision and decree likewise violated the due process clause of the 14th Amendment in that it held the Tax Collector's posting as illegal and determinative, despite the failure of requisite proof thereof?

(3) Whether the said decision and decree violated the non-impairment of contract clause of Section 10 of Article I of the United States Constitution; also the due process clause of the 14th Amendment, in that it voided a consummated agreement and completed transaction between the plaintiff and defendant AMITY ESTATES, INC., whereby plaintiff terminated his interest in the subject premises, releasing same to his landlord and said parties entered into the respective relationship of landlord and tenant, pursuant to which various commitments were made and had by the said parties?

(4) Whether the decision and decree violated the due process clause of the 14th Amendment in that the action by plaintiff being a suit in equity, nevertheless the Court awarded the plaintiff a substantial bill of costs in all Courts and a windfall remission of all taxes on the subject premises for some six years?

(5) Whether the decision and decree of the Court of Appeals of the State of New York deprived defendants of any interest in the subject premises in violation of the due process clause of the 14th Amendment of the United States Constitution and the tax levy clause of the Tenth Amendment of the United States Constitution, particularly in that it voided the uncontested levy and lien of the 1949 tax of the County of Greene, State of New York, as it affected the Town of Greenville in that County, the taxable real estate in the Town, including the subject premises?

(6) Whether the said decision and decree were likewise so violative, since it also voided the respective levies and liens of the 1950, 1951, 1952, 1953, 1954 and 1955 taxes affecting the subject premises, although these were not in issue or disputed?

(7) Whether Section 69 of Article 4 of the New York State Tax Law in its application to a tax levy and to an owner of a tax deed containing the recitals of regularity, and as it was applied by the plaintiff and the Court of Appeals in the cancellation of said tax deed to the subject premises under the circumstances and facts presented in the record, is repugnant to the United States Constitution, in that such application deprived appellants of property without due process of law, in violation of the 14th Amendment of the United States Constitution?

Statement of the Case

Appellee derives his claim of title under a deed from one Whitbeck in July, 1952 for a consideration of $4,000 (131, 129). In December, 1949 the annual realty tax was levied against the parcel. The tax collector, a town official, thereafter received the warrant and the tax was payable in Jan-

uary, 1950. The tax not being paid, the parcel was advertised for tax sale on April 23, 1951 by the County Treasurer. Amity Estates, Inc. (herein referred to as Amity) that day bid in the item, and received a tax sale certificate. After the expiration of three years from the sale it received a certificate of non-redemption which was recorded along with a tax-deed previously issued to it.

Inevitably in December, 1950 and yearly thereafter to date annual taxes were levied. Appellee has paid none of these. Some, amounting to $1,483.05 by March, 1955 were secured to the County by advances by Amity Estates, Inc., and later taxes were levied in additional amount.

Appellee claiming ownership under his own deed instituted his action in September 1954 to cancel the tax-deed, tax-sale certificate and to bar all defendants from any claim in the premises basing his case solely upon alleged dereliction of the town collector in posting. What he did not attack was the antecedent levy of the tax nor for that matter any of the subsequent levies of later years. He made no claim that the requirements of the County tax sale and redemption notice for the questioned year were not proper in form except that they were invalid for the one reason of the town tax collector's antecedent alleged dereliction in posting. Defendants denied the material allegations of the complaint and Amity further asserted its tax-deed, expiration of the redemption period, acknowledgment by plaintiff of its title yielding right to possession to it, becoming its tenant, paying rent causing it to change its position, estoppel, waiver and statute of limitations (40-62).

Defendants were successful at the trial. The trial findings were unanimously affirmed in the Appellate Division. The Court of Appeals reversed.

The Questions Are Substantial

It is respectfully submitted that the questions herein presented are so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution.

Inquiry at the New York State Tax Board of Equalizations discloses that except for less than a dozen Counties the remainder of the 62 Counties of the State of New York levy taxes and conduct tax sales pursuant to the General Tax Law of the New York State Consolidated Law (McKinney's Book 59). Thus millions of dollars of realty and ratables are involved in the procedure.

Due process under the 14th Amendment proscribes a deprivation of right or a taking of property without due process. Unlitigated in this action was the tax levy of the instant year and the respective levies of the subsequent years, the latter having respective priority (§ 99). Yet the majority decision of the Court of Appeals, ruled that as of July 11, 1956 "* * * all the defendants herein should be adjudged to have no interest in the premises here concerned."

It is elementary that the State through its enactment of the General Tax Law was reserved this right to tax under the Tenth Amendment. Under said Law and the issues presented in this case, the property was lawfully assessed and tax levied upon it (§ 21, 25, 26, 58), the tax collector's statement containing enough places was sufficient, mailed and received (§ 69-a), the tax roll was regularly returned by the town collector to the County Treasurer and by the latter advertised for tax sale (§§ 82, 151), the certificate of tax sale was in the form provided by law (§ 125), notice to redeem was advertised in the prescribed form (§§ 130, 158),

the tax deed was in the legal form and described the premises (§§ 132, 158) and the certificate of non-redemption issued after three years from the sale was formally correct, describing the premises (§ 137).

This unconstitutional destruction of the series of tax levies is a matter for present judicial review. The windfall to plaintiff of several thousands of dollars is unwarranted. It may be said the construction of this case by the Court of Appeals places the tax structure in undue danger. As to Amity it was clothed with a new and complete title from which it is now barred. *Turner* v. *Smith* 14 Wall 553, 30 L. Ed. 724; *Hefner* v. *Northwestern Life Ins. Co.* 123 U.S. 747, 751, 8 S. Ct. 337, 338, 31 L. Ed. 309; *Mabie* v. *Fuller* 255 N. Y. 194.

Due process requires the existence of evidence to hold the tax collector's posting as illegal. Especially, in this case as the Court of Appeals admitted, the law placed the burden of proving irregularities upon the plaintiff. Due process required that the Court of Appeals adhere to the Constitution of the State of New York as provided in Article 6 § 7 implemented by § 605 of the Civil Practice Act. The Court of Appeals was bound by the findings of the Referee not disturbed by the Appellate Division. *Sundstrom* v. *State* 213 N.Y. 68; *Acme Realty Co.* v. *Schinasi* 215 N.Y. 495; *Berry* v *Brearton* 263 N.Y. 274; *Gresser* v. *Cohen* 275 N.Y. 440; *Randall* v. *Bailey* 288 N.Y. 280; *Aerated Products Co.* v. *Godfrey* 290 N.Y. 92.

Credibility is resolved by the trier of fact. *Foreman* v. *Foreman* 251 N.Y. 237. In that connection where there is some evidence, reversal could not be had on the ground it is unworthy of belief. *Merchants National Bank* v. *Barnes* 172 N.Y. 618. See also, *Shepard* v. *Manhattan R. C.* 162 N.Y. 56; *Bernstein* v. *Kritzer* 253 N.Y. 410; *Page* v. *Page* 139 Misc. 102, 248 N.Y.S. 493.

Yet the Court mentioned the posted notice as not specifying sufficient days and hours. As a matter of fact, the form of notice that was introduced in evidence did not relate to the year in question. The collector called as plaintiff's own witness established his promptness in posting notices in five or six places (299, 300, 302). The collector posted the relevant form of statement of taxes plus additions (317, 318). Plaintiff admitted having received the statement of taxes covering the year in question (137, 138) but never placed that in evidence. Thus we have a situation of trial findings of failure to sustain the burden of proof, unanimously affirmed by the Appellate Division and factually reversed by the Court of Appeals.

The Court of Appeals cancelled the tax sale certificate despite the provision of § 166-j providing that it "* * * shall be presumptive evidence in all courts in all proceedings by and against the purchaser * * * of the truth of the statements therein, * * * of the regularity and validity of all proceedings had in reference to the taxes, assessments or other legal charges for the non-payment of which the tax lien was sold * * *. After two years from the issuance of such certificate * * * no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale * * * by fraud or had previous knowledge that it was fraudulently made or procured".

Another essential question in the instant appeal is the further violation of the non-impairment of contract clause of § 10 of article I of the United States Constitution as well as the due process clause of the 14th Amendment in that the reversal by the Court of Appeals voided a consummated agreement and completed transaction between the plaintiff and the defendant Amity, which terminated plain-

tiff's interest in the subject premises, released same to Amity and plaintiff agreed to and became its tenant. These factual matters were dealt with at the trial and affirmed by the Appellate Division. Plaintiff in his case neither by pleading or credible proof sought to set aside the transaction the terms of which he was well aware. The action was to cancel a tax sale certificate and deed based upon the town tax collector's alleged failure in posting. The Court of Appeals in a long line of its own decisions has held itself to be concluded by a finding that an agreement truly expresses the intention of the parties. *Consolidated Electrical Storage Co.* v *Atlantic Trust Co.* 161 N.Y. 605. See also Cardozo, Jurisdiction of the Court of Appeals 2nd. Ed., p. 98 and numerous cases cited. The fact, if such it be, that plaintiff was unaware of the matter of the collector's posting is of no moment since he agreed to satisfy a claim by Amity of title and possession and entered into the new arrangement. Assuming *arguendo* the threatened claim of Amity was invalid its covenant not to sue was good consideration. *Dunham* v. *Griswold* 100 N.Y. 224; *Wahl* v. *Barnum* 116 N.Y. 87, 95. Forthermore, the transaction was consummated and commitments made by Amity in reliance.

The mere relationship of landlord and tenant estopped plaintiff from denying Amity's legal estate. *Tilyou* v. *Reynolds* 108 N.Y. 558; *Jones* v. *Reilly* 174 N.Y. 97.

For the foregoing reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel

FRANCIS A. RUF,
County Attorney of Greene County,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

APPENDIX A

FINDINGS OF SUPREME COURT: GREENE COUNTY

(Dated May 11, 1955 and included in record at folios 391-403).

Findings of Fact.

1st: Since about 1934, plaintiff has been and is a resident of the Town of Greenville, County of Greene, State of New York and occupant of the premises, the subject of this action.

2nd: Since January 1st 1949, the defendant Ralph Spoor was and still is the County Treasurer of Greene County.

3rd: The defendants Greene County and The Board of Supervisors of Greene County are domestic municipal corporations.

4th: The defendant Amity Estates, Inc., is a domestic corporation.

5th: Plaintiff claims fee ownership and right to possession of the premises, the subject of this action, by virtue of a deed to him dated July 9, 1952 and thereafter recorded on July 25, 1952 in the office of the Clerk of Greene County in Liber 328 of Deeds at page 347.

6th: On April 23, 1951, defendant Ralph Spoor as County Treasurer, sold the premises, the subject of this action, under the pertinent provisions of the Tax Law of the State of New York at a tax sale held that day in the Village of Catskill, Greene County, State of New York and the defendant Amity Estates, Inc., was the successful bidder at said tax sale for said parcel and upon receipt of the consideration of said tax sale delivered to said purchaser a tax sale certificate to the said premises.

7th: That said tax sale was had after due notice thereof according to law and after default was made in the payment of taxes assessed and levied upon aforesaid premises.

8th: Thereafter no redemption having been made the aforesaid County Treasurer made, executed and delivered to defendant Amity Estates, Inc., a tax deed to the aforesaid premises dated August 5, 1952.

9th: Thereafter and no redemption having been made the aforesaid County Treasurer made, executed and delivered to defendant Amity Estates, Inc., a certificate of non-redemption dated April 26, 1954 and said certificate together with the tax deed were recorded in the office of the Clerk of Greene County on April 30, 1954 in Liber 336 of Deeds at page 49 and by virtue of said tax deed and certificate of non-redemption defendant Amity Estates, Inc., claims title and possession to the premises, the subject of this action.

10th: That the plaintiff claims that the taxes for which the sale was held were invalid by omission of posting of the then Collector of Taxes, but plaintiff has failed in his burden of proof in establishing the invalidity of said taxes.

11th: That more than three years elapsed since the date of the tax sale before the institution of this action, that no redemption was made in respect to said tax sale and that the time for redemption expired.

12th: That in May, 1954, plaintiff became fully cognizant of the aforesaid tax deed and the claim of title and right to possession of the real property, the subject of this action, but nevertheless acknowledged the validity of the defendant's, Amity Estate, Inc., tax deed, title and right to possession and yielded the right to possession to aforesaid defendant, and entered into an agreement with said defendant to become its tenant at a monthly rental, recognizing it as his

landlord and caused this defendant to change its position for sufficient consideration.

13th: That plaintiff paid defendant, Amity Estates, Inc., rent for the months of June and July, 1954 but thereafter failed to make any further payments and instead instituted this action.

14th: That such agreement between plaintiff and defendant, Amity Estates, Inc., is conclusive, constituted an accord between said parties, a limitation and termination of plaintiff's right, if any, to title to the subject premises and any rights of redemption and the plaintiff has waived and is estopped from asserting any alleged irregularities in the title of Amity Estates, Inc., in the subject premises.

15th: That the co-defendants, Ralph Spoor, County Treasurer of Greene County, Greene County, and The Board of Supervisors of Greene County have no interest or title in and to the premises, the subject of this action, except to levy and collect taxes in the usual course for years subsequent in date to the tax year for which taxes the premises were sold.

16th: That the plaintiff has established no cause of action as against the co-defendants nor has any cause of action accrued to the defendant Amity Estates, Inc., as against the co-defendants for reimbursement, since Amity Estates, Inc., is the successful party as against the plaintiff.

And I do further find:

Conclusions of Law.

1st: That defendant Amity Estates, Inc., became and still is the owner of the premises, the subject of this action, and is seized of a valid, absolute and unencumbered title to the aforesaid real property in fee simple.

2nd: That the estate, title and interest held by the plaintiff and the co-defendants and each of them was wholly and effectively extinguished and barred by the delivery of the tax deed and certificate of non-redemption.

3rd: That the defendant Amity Estates, Inc., is entitled to judgment against the plaintiff and the co-defendants and each and everyone of them and every person claiming under them except to the right of the co-defendants to levy and collect taxes subsequent in date to the tax year for which taxes the premises were sold.

4th: That the defendant, Amity Estates, Inc., is entitled to a judgment awarding sole possession of the aforesaid property to it and barring the plaintiff and co-defendants from possession.

APPENDIX B

DECISION: APPELLATE DIVISION: THIRD DEPARTMENT

1 App. Div. 2d 731; 147 N.Y.S. 2d 474 (December 23, 1955)

Appeal by plaintiff from a judgment of the Supreme Court (Heffernan, O. R.), entered in Greene County on the 16th day of May, 1955, dismissing plaintiff's complaint and determining that valid title to certain real estate was in defendant, Amity Estates, Inc.

Plaintiff brought this action to declare invalid and void a certain tax deed from the County Treasurer of Greene County to defendant Amity Estates, Inc., and to cancel the deed of record because of the failure of the Tax Collector to post proper notices under Section 69 of the Tax Law. Plaintiff's asserted title to the premises in question is by

virtue of a deed to him dated July 9, 1952. Defendant Amity Estates, Inc., purchased the property at tax sale on April 23, 1951, for non-payment of 1949 taxes. It thereafter received a tax deed from the County Treasurer dated August 5, 1952, and a certificate of non-redemption dated April 26, 1954, both of which were recorded in the Greene County Clerk's office on April 30, 1954. The Official Referee has found as a fact that: "* * * plaintiff has failed in his burden of proof in establishing the invalidity of said taxes." The evidence sustains the finding. Moreover, more than three years elapsed since the date of the tax sale prior to the commencement of this action without redemption, the time for redemption expired and the title of the purchaser at tax sale became absolute and the regularity of procedure preliminary to the sale conclusively presumed (Tax Law, § 137; *Mabie* v. *Fuller*, 255 N. Y. 194; *Elar Development Co., Inc.* v. *County of Sullivan*, 279 App. Div. 949).

Judgment unanimously affirmed, without costs.

Present—Foster, P. J., Bergan, Coon, Halpern and Zeller, J.J.

APPENDIX C

DECISION: MAJORITY AND MINORITY OPINIONS OF THE COURT OF APPEALS.

July 11, 1956

2 New York 2d 43; 155 N.Y.S. 2d 633.

CONWAY, Chief Judge.

In 1934, plaintiff, as tenant, entered into possession of a 135-acre farm in the town of Greenville, Greene County, New York, under a lease with one Marilla Whitbeck, landlord, at a yearly rental of $150. Plaintiff remained in possession under the lease until about 1948, when the landlord

and he entered into an agreement whereby plaintiff could purchase the farm for the sum of $4,000 and, upon the payment of that sum in full, would receive a deed. Plaintiff, thereupon, made and completed such payment, and, in 1952, received a deed from Mrs. Whitbeck, which was recorded in Greene County the same year. Pursuant to the lease and agreement to purchase, plaintiff was to pay the taxes. He paid the taxes for 1948, but failed to pay any taxes thereafter. Because of plaintiff's failure to pay the 1949 taxes, defendant, Amity Estates, Inc., hereinafter referred to as "Amity", purchased the farm at a tax sale on April 23, 1951 for the sum of $230.21. Amity thereafter received a tax deed from the County Treasurer, dated August 5, 1952, and a certificate of nonredemption, dated April 26, 1954, both of which instruments were recorded in the office of the County Clerk of Greene County on April 30, 1954.

It was not until April of 1954 that plaintiff learned for the first time that his farm had been sold for taxes and that Amity held a tax deed to the premises. Plaintiff obtained that knowledge from an insurance broker who, at the request of Amity, visited the farm to inspect it with reference to prospective insurance. On April 29, 1954 plaintiff visited and inquired of the County Attorney and the County Treasurer as to his right, if any, to redeem the property. He was advised at that time that he was entitled to redeem. On the next day, however, plaintiff received a letter from the County Attorney which indicated that plaintiff had been given incorrect information and that under the Tax Law, McK. Consol. Laws, c. 60, he did not have the right to redeem the property. Thereafter, on May 11, 1954, plaintiff received a letter from Amity's attorney, who was also an officer and director of Amity, hereinafter referred to simply as "Amity's representative," in which Amity's representative stated that he wished to afford plaintiff the opportunity

to voluntarily vacate the premises. In a postscript, Amity's representative said: "It may be that you would wish to remain in occupancy under a rental arrangement. If so, let me know." Plaintiff did not reply to the above communication from Amity.

After receiving such communication, plaintiff inquired of two lawyers in Catskill as to his status. The first lawyer told the plaintiff that it was out of his line and the second lawyer, after communicating with the County Treasurer's office, told the plaintiff that he could not do anything for him. On May 15, 1954 Amity's representative visited the plaintiff at his farm. Amity's representative, at that time inspected the premises, and inquired whether plaintiff had consulted anyone regarding his alleged ownership of the farm. Plaintiff replied that he had consulted counsel of his own choosing and was under the belief that he no longer had any title or interest in the farm. Plaintiff asked Amity's representative if he could buy the farm from Amity. When plaintiff stated that he did not have the requested sum of $400 for a down payment, Amity's representative said that there was no sense in talking about a sale. Plaintiff stated that it would be a hardship to surrender the farm, to which Amity's representative countered that he would not be ousted if some fair, businesslike arrangement could be made. Plaintiff asked how much the rental would be, and Amity's representative replied that he would take up that matter when he returned to the city. After that meeting with Amity's representative, plaintiff received a letter from such representative, dated May 27, 1954, which stated, in essence, that the monthly rental would be $100. Amity took out fire and liability insurance some time during May, 1954, and paid the premiums of $85.46 therefor. Plaintiff paid Amity $100 rental for June and $100 rental for July. Thereafter,

plaintiff commenced this action seeking to have the tax deed which was received by Amity, set aside as void.

The theory of plaintiff's action is that the tax collector failed to comply substantially with section 69 of the Tax Law, and that such noncompliance, being a jurisdictional defect, rendered the subsequent tax sale void. The pertinent portion of section 69 of the Tax Law, entitled "Notice by collector: general", provides: "Every collector, upon receiving a tax-roll and warrant, *shall forthwith* cause notice of the reception thereof *to be posted in five conspicuous places* in the tax district, specifying one or more convenient places in such tax district, where he will attend *from nine o'clock in the forenoon until four o'clock in the afternoon*, at least *three days * * * in each week for thirty days from* the date of the notice * * * *which days shall be specified in such notice*, for the purpose of receiving the taxes assessed upon such roll. The collector *shall* attend accordingly, and any person may pay his taxes to such collector at the time and place so designated, or at any other time or place. * * *" (Emphasis added.)

Under section 131 of the Tax Law, such tax conveyance of Amity "shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all the provisions of law relating thereto." Thus, in this action by plaintiff, wherein is sought a declaration that the tax deed is void and that it be set aside, Amity was entitled to rely on the above described presumption of regularity. However, as stated in Bunner v. Eastman, 50 Barb. 639: "If it is only presumptive evidence of regularity, then that presumption may be overcome, and the only effect of the statute [precursor of present § 131] is to shift the bur-

den of proof from the party claiming under the deed, to the other party who seeks to overthrow it." And, as we said in People ex rel. Wallington Apts. v. Miller, 288 N.Y. 31, 33, 41 N.E.2d 445, 446, 141 A.L.R. 1036: "Such a presumption [that of regularity of proceeding conducted by sworn tax officers] is not evidence but serves in place of evidence until the opposing party comes forward with his proof, whereat it disappears. It has no weight as evidence and is never to be considered in weighing evidence." See, also, Wellisch v. John Hancock Mut. Life Ins. Co., 293 N.Y. 178, 184, 56 N.E.2d 540, 542. Upon the trial of the present case, plaintiff sought to and, in our opinion, did overthrow such presumption of regularity. Thus, plaintiff elicited from the tax collector himself evidence of the following noncompliance with the provisions of section 69: (1) The notice under that section must specify that the collector will attend to receive the taxes from 9 o'clock in the forenoon until 4 o'clock in the afternoon; the notice herein did not specify any particular hours. (2) The notice under section 69 must specify that the collector will attend to receive taxes on at least 3 days in each week for 30 days (this amounts to at least 12 different days); the notice herein specified only 6 different days. (3) Section 69 requires posting of the notice in 5 conspicuous places; the collector posted in only one place, and, as he testified, "The postmaster, John Ives, I guess posted [the others]". It is true that the tax collector testified on cross-examination that when he went to the places designated as those where taxes might be paid, he saw the notices *then* posted. That, of course, does not establish that such notices were posted "forthwith" as required.

What we must determine is whether this noncompliance rendered the tax deed void.

In approaching that question we bear in mind the principle which is so well stated in Cooley on Taxation, 2d Ed.

(1886), p. 470: "Tax sales are made exclusively under a statutory power. * * * The officer who makes the sale sells something he does not own, and which he can have no authority to sell except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail the power is never created. If one of them fails it is as fatal as if all failed. Defects in the conditions to a statutory authority cannot be aided by the courts; if they have not been observed the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. * * * It is therefore accepted as an axiom when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales." See, also, Lockwood v. Gehlert, 127 N.Y. 241, 248, 27 N.E. 812, 813; Neber v. Hatch, 10 Abb.N.C. 431, affirmed on opinion below 88 N.Y. 657; Saranac Land & Timber Co. v. Roberts, 208 N.Y. 288, 311, 101 N.E. 898, 905; Helterline v. People, 295 N.Y. 245, 251, 66 N.E.2d 345, 347; McKinney's Consol.Laws of N. Y., Book 1, Statutes, § 313, pp. 356-357.

When we measure what was actually done in the present case by the requirements of section 69 of the Tax Law, we are forced to the conclusion that there was not a substantial compliance with the statute. The requirements of section 69 are not merely directory. That section provides: "Every collector * * * *shall* forthwith cause notice * * * to be posted * * * which days *shall* be specified in such

notice * * *. The collector *shall* attend accordingly * * *." (Italics supplied.) The word "shall" is one of mandate. Without question, the statute was enacted for the benefit of the taxpayer. The Legislature has commanded that the collector provide the requisite notice and, in its wisdom, has described the specific procedure which must be employed. We cannot dispense with that which the Legislature has deemed necessary. If we were permitted to dispense with even one requirement of section 69, we would be able to excuse compliance with the statute *in toto.*

The failure on the part of the tax collector to substantially comply with the mandatory requirements of section 69 pertaining to notice is a jurisdictional defect. See Olds v. City of Jamestown, 280 N.Y. 281, 285, 20 N.E.2d 756, 758; Seafire, Inc., v. Ackerson, 193 Misc. 965, 76 N.Y.S.2d 805, affirmed 275 App.Div. 717, 87 N.Y.S.2d 438, affirmed 302 N.Y. 668, 98 N.E.2d 478.

Plaintiff does not claim that the collector failed to comply with the provisions of section 69-a of the Tax Law to the effect that "The collector shall immediately after the receipt of a tax-roll and warrant mail to each owner of real property included in such tax-roll * * * a statement of the amount of taxes assessed against his property with a notice of the dates and places fixed by him for receiving taxes, together with the name, address and post office address of such collector * * *." We may thus assume that the collector mailed the "statement of taxes" to plaintiff pursuant to section 69-a of the Tax Law and that the plaintiff received such statement. However, actual notice by the taxpayer does not excuse the tax collector's noncompliance with the notice requirements of section 69 of the Tax Law. See, Seafire, Inc., v. Ackerson, supra. If we were to countenance the lack of substantial compliance with section 69,

merely because the taxpayer received actual notice by mail under setion 69-a, we would, in effect, render section 69 of no effect and useless. A mere showing of compliance with section 69-a would excuse compliance *in toto* with section 69. Under a parity of reasoning, if "actual notice" be deemed the key, so long as it could be shown that the taxpayer received actual notice of taxes *by any means,* we could dispense with the collector's compliance with *both* section 69-a and section 69. This, of course, may not be. The Legislature has prescribed the *type* of notice to which the taxpayer is entitled before his property may be declared forfeit for nonpayment of taxes. It is not for the courts to announce that some other type of notice will suffice to accomplice that purpose.

In holding that Amity had a valid tax title, the Appellate Division, citing section 137 of the Tax Law, declared that since more than three years had elapsed from the date of the tax sale to the date of the commencement of this action without redemption, the time for redemption had expired, the title of Amity had become absolute and the presumption of regularity of procedure preliminary to the sale had become conclusive. That presupposes first that plaintiff is seeking to redeem and second that the proceedings for the assessment and collection of the tax and for advertisement and sale of the premises were conducted substantially in accordance with the provisions of the Tax Law, for statutes which limit the time for redemption after tax sales are not applicable where the tax sale is void because of the jurisdictional defect of failure to give the notice required by law. See Olds v. City of Jamestown, 280 N.Y. 281, 285, 20 N.E.2d 756, 758, supra; Callahan v. Underwood, 260 App.Div. 352, 21 N.Y.S.2d 253, affirmed 285 N.Y. 620, 33 N.E.2d 551. Plaintiff is not seeking to redeem but is seeking to cancel a void deed. Nor is the present action barred by the two-year time

limitation prescribed by sections 131 and 132 of the Tax Law, which bar actions to cancel deeds stemming from jurisdictional defects as well as from mere irregularities, Meigs v. Roberts, 162 N.Y. 371, 56 N.E. 838, since that time limitation begins to run from the date of recording. See Bryan v. McGurk, 200 N.Y. 332, 93 N.E. 989. The tax deed in our case was recorded on April 30, 1954. Plaintiff commenced the present action in September of 1954, well within the two-year period.

Amity contends, in substance, that even if jurisdictional defects be deemed to have existed, plaintiff, by virtue of his having become the tenant of Amity, caused an "acord" to be effected, "waived" such jurisdictional defects, and is "estopped" from now asserting any claim of title to the subject premises.

It is conceded that a landlord-tenant relationship was created, that the tenant (plaintiff) was to pay the sum of $100 per month as rental to the landlord (Amity), and that the plaintiff paid such rent for two months, after which time he commenced the present action. However, that does not establish an accord, a waiver or an estoppel in favor of Amity.

An accord is "An agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim something other than what he believes himself entitled to * * *." Reilly v. Barrett, 220 N.Y. 170, 172-173, 115 N.E. 453, 454. However, as this court stated in Kromer v. Heim, 75 N.Y. 574, 577: "The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that *the intent was to accept the new promise, as a satisfaction*

of the prior obligation." (Emphasis added.) Here, there is no evidence in the record from which an *intent* to *substitute* or *satify* any claim of plaintiff can be gleaned. In fact, the contrary appears. Plaintiff, at the time when the rental arrangement was made, asserted no adverse claim to Amity which could possibly have been the subject of a compromise; and Amity, in dealing with plaintiff at that time, so recognized the position of plaintiff. Hence, the contention of Amity that an accord was effected herein is untenable.

A waiver is "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it". Whitney on Contracts, 4th Ed., 1946, p. 273. In the present case no waiver was effected because the plaintiff had no knowledge of the right he is charged with having knowingly and intentionally relinquished. There is no evidence in the record which indicates that plaintiff, at the time when the rental arrangement was made with Amity, knew that the tax collector had failed to comply with the "posting of notice" requirements of section 69 of the Tax Law, and that he thus had the right to have Amity's tax deed cancelled. Amity, however, points to certain testimony of plaintiff, which, it claims, indicates that he had the requisite knowledge. Thus, plaintiff, in response to a question on direct examination by his own counsel, testified as follows: "Q. Now, I would like to go back to that time in December of 1949, and ask you if you recall seeing any notices posted in the Town of Greenville? A. I don't remember ever seeing any posters." That testimony is of no aid to Amity. That plaintiff did not see any posted notices does not mean that he *knew* that such notices had not *in fact* been posted. Furthermore, he could not possibly have known that the *contents* of the notices were defective for the simple reason that, as he testified, he never saw a posted notice. Hence, on the basis of the above response, plaintiff cannot

be said to have known that there had not been compliance with section 69 of the Tax Law. Should plaintiff be *charged* with such knowledge? Clearly not. Under no system of jurisprudence may a person (plaintiff here) be arbitrarily *charged* with knowledge that a law, Tax Law, § 69, has been violated by a *third* person (tax collector).

To constitute estoppel, "* * * the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another * * * and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." New York Rubber Co. v. Rothery, 107 N.Y. 310, 316, 14 N.E. 269, 271. The present record is devoid of any facts upon which an estoppel may be predicated.

The initial offer for a rental arrangement was made by Amity, not by the plaintiff. In Amity's letter, dated May 11, 1954, to plaintiff, which was the first contact had between the parties, Amity's representative, in effect, stated: We hold a tax deed to your property. If you do not vacate voluntarily, my instructions are to proceed against you. However, if you wish to remain in possession under a rental arrangement, let me know. When plaintiff did nothing with respect to the above ultimatum, a further affirmative step was taken by Amity on or about May 15, 1954 when Amity's representative personally visited the plaintiff at his farm. At that time, a possible rental arrangement was discussed and, except for the amount of rental, an agreement was apparently reached. Thereafter, Amity again assumed the role of actor when, by its letter to plaintiff, dated May 27, 1954, a rental of $100 per month was offered to plaintiff. Thus, on the basis of the foregoing, it would appear that Amity was the instigator of, and active participant in, the negotia-

tions which culminated in the relationship described. Plaintiff was passive throughout. Accordingly, it cannot be argued that plaintiff performed any act upon which Amity can be said to have, in fact, relied or changed a position.

There is one further matter to be considered. In its pleadings, Amity interposed a counterclaim against its codefendants (the County Treasurer of Greene County, Greene County itself, and the Board of Supervisors of Greene County). The theory of such counterclaim was that in the event Amity's tax deed should be declared void, it should be reimbursed for all payments made and expenses incurred in connection with the tax sale. Since Amity was the successful party in the trial court and in the Appellate Division, it was unnecessary for those courts to consider that phase of the case. In view of our determination of reversal herein, the matter should be remitted to the Supreme Court of Greene County, in order to enable that court to pass on this claim of Amity for reimbursement and, if so entitled, the extent thereof.

As prayed for in plaintiff's complaint, the tax deed to Amity should be declared void, such deed should be surrendered by Amity to the County Treasurer for cancellation and should be adjudged to be cancelled of record, the certificate of sale (dated April 23, 1951) should be cancelled and adjudged to be cancelled of record, and all the defendants herein should be adjudged to have no interest in the premises here concerned.

The judgment of the Appellate Division and that of the Supreme Court should be reversed, with costs to plaintiff in all courts, and the matter remitted to the Supreme Court for further proceedings in accordance with the opinion herein.

DESMOND, Judge (dissenting).

As both courts below held, plaintiff failed to sustain his burden of proof. His allegations as to invalidity of the 1949 tax were two: first, that there was a failure to comply with so much of section 69 of the Tax Law as required posting in five conspicuous places; and, second, that the notice as posted did not contain the statements required by that section as to the various times and places when and where the collector would attend for the collection of the taxes. Actually, of those assertions plaintiff made no proof whatever of either.

1. *As to the number of places where the notice was posted*: the undisputed and only testimony on the subject was that of the collector, called as plaintiff's witness, who swore that he personally saw the notices posted up in six places.

2. *As to the alleged deficiency in content of the notices*: here again the only testimony was that of the collector. He was unable (the trial was held six years after the notice was given) to produce a copy of the notice as posted. He did produce a paper marked as Exhibit A, but as plaintiff's counsel frankly and correctly tells us in his brief on this appeal: "This exhibit was *not* offered as one of the statements posted for the year 1949 but merely as being one similar to the statements used at that time." (Italics supplied.) The result was that the record does not disclose what the contents were of the notices as posted.

At the very best for plaintiff, there was a question of fact as to the notice itself being deficient in content, and both courts below answered that question in favor of defendant. Since plaintiff has failed factually to prove his allegations, no other question of law need be discussed.

The judgment should be affirmed, with costs.

FROESSEL, VAN VOORHIS and BURKE, JJ., concur with CONWAY, C. J.

DESMOND, J., dissents in an opinion in which DYE and FULD, JJ., concur.

Judgments reversed, etc. Motion to permit inspection of subject property denied.

APPENDIX D

DECISION: ORDER APPEALED FROM—COURT OF APPEALS, October 11, 1956

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eleventh day of October, A.D. 1956.

Present, HON. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 407

ARTHUR WERKING,

Appellant,

vs.

AMITY ESTATES, INC., RALPH SPOOR, County Treasurer of Greene County and GREENE COUNTY,

Respondents,

THE BOARD OF SUPERVISORS OF GREENE COUNTY,

Respondent,

Brought in as a party to answer the counterclaim of defendant Amity Estates, Inc., herein.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

(Court of Appeals Seal) (s) GEARON KIMBALL
Deputy Clerk

APPENDIX E

NOTICE OF MOTION IN THE COURT OF APPEALS, Returnable October 1, 1956.

SIR:—

PLEASE TAKE NOTICE that upon the annexed brief, and upon the opinion of the Court, the remittitur, order of reversal, record on appeal and the proceedings heretofore had on this appeal, the undersigned will move this Court at a Stated Term thereof, appointed and to be held at the Court House, Court of Appeals Hall, in the City of Albany, New York, on October 1, 1956, at the opening of said Court or as soon thereafter as counsel can be heard, for an order herein granting a reargument of the said appeal herein, and upon such reargument affirming the judgment and order of the Appellate Division and of the Supreme Court, recalling the remittitur, opinion and order of reversal, vacating any proceedings and judgment under such remittitur and order, amending the remittitur to disclose that a constitutional question was presented by respondents and necessarily decided on the appeal to this Court, namely the due process

clause of the 14th amendment, the non-impairment of the obligation of contract clause Section 10 of Article I and the right reserved to a state to levy taxes under the 10th amendment, and granting such other and further relief as may be just in the premises.

Dated, September 4th, 1956.

Yours etc.,

[Addressed to all attorneys of record.]

APPENDIX F

(Applicable Statute)

CONSTITUTION OF THE STATE OF NEW YORK, Article 6 § 7 (Jurisdiction of the court of appeals) *in part.*

The jurisdiction of the Court of Appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

CIVIL PRACTICE ACT OF THE STATE OF NEW YORK, Article 38 § 605. Review of questions of fact in the court of appeals.

The court of appeals shall be limited to review of questions of law, except that it shall review the questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, has express-

ly or impliedly found new facts, and a final judgment or final order pursuant thereto has been entered.

TAX LAW: CHAPTER 60 OF THE CONSOLIDATED LAWS (McKinney's Book 59 Part I.)

§ 21. PREPARATION OF ASSESSMENT-ROLL (*in part*)

1. The assessors shall prepare an assessment-roll or rolls, the form of which shall be prescribed or approved by the tax commission, so classified and arranged with respect to number of parts and number of columns in each part and with such entries and descriptions as shall be sufficient to identify each separately assessed parcel or portion of real estate with the approximate quantity of the square feet, square rods or acres contained in such parcel or portion or a statement of the linear dimensions thereof and each special franchise. Assessments of real property, other than special franchises, shall be carried in a separate part of the roll from the assessments of special franchises.

§ 25. NOTICE OF COMPLETION OF ASSESSMENT-ROLL

The assessors shall complete the assessment-roll on or before the twenty-fourth day of July, and make out a copy thereof, to be left with one of their number, and forthwith cause a notice to be conspicuously posted in three or more public places in the tax district, stating that they have completed the assessment-roll, and that a copy thereof has been left with one of their number at a specified place, where it may be seen and examined by any person until the second Tuesday of August next following and on that day they will meet at a time and place specified in the notice to review their assessments. In any city the notice shall conform to the requirements of the law regulating the time, place and manner of revising assessments in such city. During the

time specified in the notice the assessor with whom the roll is left shall submit it to the inspection of every person applying for that purpose.

§ 26. COMPLETION OF ASSESSMENT-ROLL; NOTICE TO NON-RESIDENTS

The assessors shall between the twenty-fourth and twenty-ninth days of July mail a notice to each person and corporation non-resident of their tax district, who has filed with the city or town clerk, on or before the fifteenth day of June preceding, a written demand thereof. Such notice shall specify each parcel or portion of real property separately assessed to said non-resident person or corporation, the assessed valuation thereof, and the time and place at which the board of assessors will meet for the purpose of hearing complaints in relation thereto. Upon application made on or before the second Tuesday of August by any non-resident owner of real estate, or by a corporation, having real property in more than one tax district in the county, the assessors shall fix a time subsequent to the second Tuesday in August, but not later than the thirty-first of August, for a hearing and to review their assessment.

§ 58. LEVY OF TAX BY SUPERVISORS

The board of supervisors of each country shall, at its annual meeting, levy the taxes for the county, including the state tax, upon the valuations as equalized by it and estimate and set down in a separate column in the assessment-roll of each tax district therein, opposite to the sums set down as the valuation of real property the sum to be paid as a tax thereon, including the state tax, as fixed by the department of taxation and finance. Such assessment-roll shall, when the warrant is annexed thereto, become the tax-roll of the district, and a copy thereof shall be delivered to

the proper supervisor, who shall deliver it to the clerk of the proper city or town to be kept by him for its use.

§ 69. NOTICE BY COLLECTOR; GENERAL (*in part*)

Every collector, upon receiving a tax-roll and warrant, shall forthwith cause notice of the reception thereof to be posted in five conspicuous places in the tax district, specifying one or more convenient places in such tax district, where he will attend from nine o'clock in the forenoon until four o'clock in the afternoon, at least three days, and if in a city, at least five days, in each week for thirty days from the date of the notice, which shall be the date of the posting or first publication thereof, which days shall be specified in such notice, for the purpose of receiving the taxes assessed upon such roll. The collector shall attend accordingly, and any person may pay his taxes to such collector at the time and place so designated, or at any other time or place. In a city, the notice in addition to being posted shall be published once in each week, for two weeks successively, in a newspaper published in such city.

§ 69-a. STATEMENT OF TAXES (*in part*)

The collector shall immediately after the receipt of a tax-roll and warrant mail to each owner of real property included in such tax-roll whose name and address he is able to ascertain a statement of the amount of taxes assessed against his property with a notice of the dates and places fixed by him for receiving taxes.

§ 82. RETURN BY COLLECTOR OF UNPAID TAXES (*in part*)

Each collector shall immediately upon the expiration of his warrant make and deliver to the county treasurer an account of unpaid taxes, upon the tax-roll annexed to his war-

rant, which he shall not have been able to collect, verified by his affidavit, that the sums mentioned therein remain unpaid, and upon the verification of the said account by the county treasurer he shall be credited by the county treasurer with the amount of such account. In making such return of unpaid taxes, the collector shall add thereto five per centum of the amount thereof.

§ 99. PRIORITY OF TAX LIENS

All tax liens of all tax districts which become liens against the same parcel of property in the same calendar year shall be superior to all tax liens against such parcel which became liens in any preceding year, except that where any general, special or local law provides that a tax district which holds and owns a lien for taxes imposed by it, has different rights of priority than other holders or owners of such tax liens, such tax liens of such tax district shall rank in priority as may be provided by such laws.

§ 125. PAYMENT OF BIDS AND CERTIFICATE OF PURCHASE

Every purchaser at any sale of lands by the department of taxation and finance under this article shall pay the amount of his bid into the state treasury within forty-eight hours after the last day of sale. Upon the payment of a bid such department shall give to the purchaser a written certificate, describing the lands purchased, the sum paid and the time when the purchaser will be entitled to a deed. Such certificate shall also contain a statement substantially as follows: The purchaser, if the lands herein described are not redeemed, may, either complete the purchase and take a conveyance of the lands as provided in the tax law, or, at his option, foreclose his lien pursuant to article seven-a of said law.

§ 130. NOTICE OF UNREDEEMED LANDS (*in part*)

The department of taxation and finance shall, at least three months before the expiration of the one year allowed for the redemption of lands sold by it for taxes, cause a notice to be published once in each week for at least six weeks successively, the last publication to be at least six weeks before expiration of the year, in the newspapers designated by the board of supervisors of the county in which such lands are situated to publish the concurrent resolutions, containing a list of the lands in such county sold for taxes and unredeemed, specifying particularly every parcel unredeemed, and the amount necessary to redeem the same, calculated to the last day in which such redemption can be made, and stating that, unless such lands are redeemed by a certain day, they will be conveyed to the purchaser.

§ 132. EFFECT OF FORMER DEEDS

Every such conveyance heretofore executed by the comptroller, county treasurer or county judge and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller, that shall have remained in force for two years after the last day allowed by law for redemption from such sale, shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served according to the provisions of all laws directing and requiring the same or in any manner relating thereto, but all such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject

to cancellation, by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the department, or in an action brought before a competent court therefor; provided, however, that such application shall be made, or such action brought, in the case of all sales held prior to the year eighteen hundred and ninety-five, within one year from June fifteenth, eighteen hundred and ninety-six; and in the case of the sale of eighteen hundred and ninety-five and of all sales hereafter held, that such application shall be made, or such action brought, within five years from the expiration of the period allowed by law for the redemption of lands sold at the particular sale sought to be canceled.

§ 137. Redemption by occupant before notice and effect of failure to redeem

The occupant of any lot or separate tract of land sold for taxes by the department of taxation and finance, or any part thereof, or any other person may, at any time before the service of such notice by the purchaser or those claiming under him, and within two years from the expiration of the year allowed by law for the redemption thereof and not thereafter, redeem any land so occupied, by filing with the department of taxation and finance satisfactory evidence of such occupancy, and by paying to such department the same amount as are specified for redemption under section one hundred thirty-six of this chapter, with the exception of the statutory fees for the deed where no deed has been issued. On application for such redemption the department may take all material evidence offered with reference to the occupation of the lands in question. The hearing shall be had on at least ten days' notice to the party applying for the re-

demption. In case of failure to redeem within the time herein specified, the sale and conveyance thereof shall become absolute and the occupant and all other persons barred forever.

§ 151. ADVERTISEMENT AND SALE (*in part*)

The county treasurer shall immediately after the expiration of such six months elsewhere than in the counties of Orange, Sullivan and Ulster and in the counties of Orange, Sullivan and Ulster immediately after the expiration of such period of one year, and in the counties of Franklin, Rockland, Ontario, Suffolk and Essex, where the sale has been deferred, six weeks prior to the deferred date, cause to be published at least once in each week for six weeks, in two newspapers designated for the publication of the concurrent resolutions, a list of real estate so liable to be sold, together with a notice that such real estate will, on a day at the expiration of said weeks specified in such notice, and the succeeding days, be sold at public auction at the court house in the county where the same is situated, to discharge the taxes, interest and expenses that may be due thereon, at the time of such sale.

§ 158. PROVISIONS OF ARTICLE SIX TO APPLY TO TREASURER

The provisions of article six of this chapter, entitled "sales by state for unpaid taxes and redemption of lands" shall, in so far as it is not otherwise herein provided, govern and control the action of the county treasurer, who shall perform the duties therein devolved upon the department of taxation and finance and the same rights and remedies shall be deemed to exist under the provisions of this article as are provided for in said article six.

§ 166-j. CERTIFICATE OF SALE AS EVIDENCE

The certificate of sale or any other written instrument representing a tax lien shall be presumptive evidence in all courts in all proceedings by and against the purchaser and his representatives, heirs and assigns, of the truth of the statements therein, of the title of the purchaser to the property therein described, and of the regularity and validity of all proceedings had in reference to the taxes, assessments or other legal charges for the non-payment of which the tax lien was sold and the sale thereof. After two years from the issuance of such certificate or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured.

MOTION FILED MAY 15 1957

FILED
MAY 15 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 806

ARTHUR WERKING,

Plaintiff-Appellee,

— against —

AMITY ESTATES, INC., RALPH SPOOR, Treasurer of Greene County and GREENE COUNTY,

Defendants-Appellants,

THE BOARD OF SUPERVISORS OF GREENE COUNTY, brought in as a party to answer the counterclaim of the defendant AMITY ESTATES, INC., herein,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE PETITION FOR A REHEARING AND PETITION FOR A REHEARING.

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.
Counsel for Appellants

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

INDEX

PAGE

Motion for leave to file petition for a rehearing..... 1

Petition for rehearing of order denying certiorari and dismissing appeal 3

Reasons for granting rehearing 3

Conclusion 5

Certificate of Counsel pursuant to Rule 58 6

Appendix A—Order 6

TABLE OF CASES CITED

Covey v. *Towns of Somers* 350 U.S. 882, 76 S. Ct. 138; 351 U.S. 141, 76 S. Ct. 724 4

Konigsberg, petr. v. *The State Bar of California*, etc. No. 5 O. T. 1956, May 6, 1957 5

Lucio v. Curran et al. 2 N.Y. 2d 157, 157 N.Y.S. 2d 948 3

Nelson v. *City* 351 U.S. 930, 76 S. Ct. 786 4

Schware, petr. v. *Board of Bar Examiners*, etc. No. 92 O. T. 1956, May 6, 1957 5

United States of America v. *Ohio Power Co.* 353 U.S. —. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 806

ARTHUR WERKING,

Plaintiff-Appellee,

— against —

AMITY ESTATES, INC., RALPH SPOOR, Treasurer of Greene County and GREENE COUNTY,

Defendants-Appellants,

THE BOARD OF SUPERVISORS OF GREENE COUNTY, brought in as a party to answer the counterclaim of the defendant AMITY ESTATES, INC., herein,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE PETITION FOR A REHEARING.

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court entered April 22, 1957 denying the petition for writ of certiori in this case and dismissing the appeal. Rehearing is sought at this time upon the matters pointed out in the annexed petition.

Dated, May 10, 1957.

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel

FRANCIS A. RUF,
County Attorney of Greene County,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

Petition for Rehearing of Order Denying Certiorari and Dismissing Appeal.

INTRODUCTION

Petitioners pray for a rehearing of the order of April 22, 1957 in this cause. The decision is attached as Appendix A.

REASONS FOR GRANTING REHEARING

Since the submission of the jurisdictional statement, this Court decided the case of United States of America, *petitioner* v. *Ohio Power Company* 353 U. S. —, holding the power to grant rehearing is consistent with the interest of justice.

In the cause at bar such situation exists in view of the decision of the New York Court of Appeals in *Lucio* v. *Curran et al.* 2 N. Y. 2d. 157, 157 N.Y.S. 2d. 948 (subsequent to the Werking case) which by a divided Court upholds the principle set forth in Wigmore on Evidence, sec. 2415, that a releasor expressive of a jural act is conclusively bound thereby; that his mind never gave assent to the terms is immaterial.

The effect of this decision is an admission by the Court of Appeals that with reference to a consummated transaction, the matter is final. Conceding arguendo that such transaction could be upset, it would require the necessity of a plenary action establishing by conclusive evidence mutual mistake or fraud, neither of which exists in the instant case. The action by appellee was to cancel a tax-deed because of antecedant failure on the part of the town col-

lector. There was no case or cause of action set forth or attempted to be proved, attacking the transaction between Werking and Amity.

This vacuum presents a situation of failure of due process even stronger than *Covey* v. *Town of Somers* 350 U.S. 882, 76 S. Ct. 138; 351 U.S. 141. 76 S. Ct. 724 and *Nelson* v. *City* 351 U.S. 930, 76 S. Ct. 786. There the proceeding or action by allegation and pleading presented a case for a tax title and the failure of due process consisted of lack of jurisdiction of the person by failure of process or due notice. In the case at bar the failure of due process is pre-eminent because of the non-existence of any jurisdiction over the subject matter. At most it might be said that the decision of the Court of Appeals as to the levy of the tax and the consummated agreement is dicta and unenforceable as any phase of an adjudication by reason of failure of due process.

The absence of any enforceable power of adjudication, in the failure of due process, renders nugatory the decision appealed from.

Again assuming arguendo, Amity's tax title was rendered void by reason of the town collector's failure to post, the interest to it conveyed by appellee under the cosummated agreement made its title full and complete. The agreement was not executory but completed under the evidence, the findings and the letter dated May 22, 1954. Appellee released his interest, occupied the premises as tenant for the specified one month and paid his rent therefor. To upset such transaction without pleading or action is an impairment of contract as well as failure of due process.

This Court's decisions of May 6, 1957—Rudolph Schware, petr., v. Board of Bar Examiners of the State of New Mexico, No. 92; Raphael Konigsberg, petr., v. The State Bar of California and The Committee of Bar Examiners of the State Bar of California, No. 5, uphold the power of this Court to explore the area of lack of proof in a State Court action which presumably includes the lack of allegations or proceedings to adjudicate.

This area must include the various unrelated tax levies erroneously voided dehors the scope of the action.

CONCLUSION

FOR THE FOREGOING REASONS, WE BELIEVE THAT THE MOTION SHOULD BE GRANTED.

Respectfully submitted,

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
County Attorney of Green County,
2 Franklin Street,
Catskill, N. Y.
For other Appellants,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds in Rule 58, of the rules of this Court.

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
County Attorney of Green County,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

April 22, 1957.

Re: *Amity Estates, Inc., et al.* v. *Werking*,
No. 806, October Term, 1956:

"PER CURIAM: The appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."

No. 806. AMITY ESTATES, INC., ET AL. *v.* WERKING. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Herman G. Blumenthal, Abraham H. Waisman* and *Francis A. Ruf* for appellants. Reported below: 2 N. Y. 2d 43, 137 N. E. 2d 321.